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In the Supreme Court of the United States

OCTOBER TERM, 1960

RAYMOND L. GOODMAN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINION BELOW

The opinion of the court of appeals (Pet., 2d App. 1-5) [1] is reported at 285 F. 2d 378.

JURISDICTION

The judgment of the court of appeals was entered on December 23, 1960 (Pet. 18). A petition for re-

[1] The petition for a writ of certiorari designates as "appendix" pages 19 through 21, containing 18 U.S.C. 152 and the order extending time for filing. Also appended and separately numbered are the opinions of the court of appeals in *United States* v. *Goodman*, No. 18,284 and *United States* v. *Strauss*, No. 18,235, which we refer to herein as "2d App." and "3d App."

The designation "R." refers to the transcript of record in the court below.

hearing was denied on February 16, 1961 (Pet. 18). On March 10, 1961, Mr. Justice Black entered an order extending the time for filing a petition for a writ of certiorari to and including April 17, 1961 (Pet. 21), and the petition was filed on April 14, 1961. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether an indictment charging that an accused, for the purpose of executing a fraudulent scheme described in the indictment "knowingly caused [certain checks] to be delivered [to specified banks] by the United States Mails" is invalid for failure to state *in haec verba* that the mail was delivered "according to the directions thereon."

2. Whether the indictment sufficiently charges mailings in execution of the scheme, under *Parr* v. *United States*, 363 U.S. 370.

3. Whether an election by the government to proceed with respect to one of two offenses in a count is objectionable as an "amendment" of an indictment.

4. Whether the language of the indictment was sufficiently plain, concise, and definite.

5. Whether the conspiracy count sufficiently stated the facts relating to bankruptcy offenses under the conspiracy.

STATUTES AND RULES INVOLVED

The pertinent statutes and rules are appended hereto as Appendix A, *infra*, pp. 10–13.

STATEMENT

Count 1 of an indictment returned in the United States District Court for the Southern District of Florida, charged that, as part of a scheme to defraud, the petitioner, on January 1, 1956, formed the Harold Corporation which obtained loans upon the basis of misrepresentations, and "when it became apparent that the said Harold Corporation was on the verge of bankruptcy", transferred its assets out of the reach of creditors (R. 4–6). The indictment further charged that the petitioner, "on or about November 6, 1957, at Miami Beach, Florida * * * for the purpose of executing the aforesaid scheme * * * knowingly caused to be delivered by the United States Mails * * * on or about November 11, 1957, to the Miami Beach First National Bank" a specified check (R. 5–6).

Counts 2, 3, 4, and 5, realleged the scheme charged in the first count and charged in similar language that the petitioner, "for the purpose of executing the aforesaid scheme * * *, knowingly caused to be delivered by the United States mails at Miami Beach, Florida" specified checks (R. 6–9).

Count 6 charged that the petitioner, during the period from November 1, 1957, to April 18, 1958, knowing that Harold Corporation was subject to a petition in bankruptcy, did "transfer and conceal and convert to his own personal use" assets falsely credited to an account entitled "Jeri Bolton", set up by the petitioner on the books of the corporation; that by utilization of this account the petitioner "transferred out of the Harold Corporation, converted to his own

use and concealed from the officers of the bankruptcy court" assets in the aggregate sum of $110,325.69, represented by 54 checks specified in the count by date, amount, payee and bank (R. 9–13).

Count 7 charged that the petitioner "in contemplation" of the bankruptcy proceeding "and with intent to defeat the bankruptcy laws" transferred a 99-year lease held by the corporation on the Cadillac Hotel of Miami Beach (R. 13).

Count 8 charged that, from January 1, 1956, to April 18, 1958, the petitioner and one Strauss, "in contemplation of" the bankruptcy proceeding, conspired, together with others, to transfer and conceal assets of the corporation and to devise a scheme to defraud the creditors, parts of the scheme being the original incorporation, the issuance of its stock to Bolton and Minnie Goodman at excessive valuations, the setting up and operation of the "Jeri Bolton" account on the corporation's books, the obtaining of the 99-year lease, the obtaining of loans and issuance of debenture bonds upon the basis of misrepresentations, and the overt acts of issuing the respective checks specified in the other counts, and an additional $45,000 check of the corporation received and negotiated on November 15, 1956, by Strauss (R. 13–18).

The indictment was dismissed in the district court as to the petitioner upon his motion on March 1, 1960 (R. 22–23), and as to Strauss upon Strauss' motion on January 8, 1960 (R. 22). Upon appeal by the United States the court of appeals reversed both of the orders of dismissal (Pet. 18; Pet., 3d App. 7–8). Strauss has not petitioned for a writ of certiorari.

ARGUMENT

The petitioner is attacking the validity of the indictment before there has been any development of the facts. Had his motion been overruled by the district court, as it was by the court of appeals, he would have had no right of review. Hence, in addition to the lack of merit in the petitioner's challenge to the sufficiency of the indictment as a pleading, which we discuss below, there is no reason for this Court to review the issues at this interlocutory stage.

1. Counts 1 through 5 of the indictment, after stating the scheme for defrauding creditors, each charged that the petitioner, on a specific date, "for the purpose of executing the aforesaid scheme * * * knowingly caused to be delivered by the United States mails" on a stated later date to a named bank a check specifically described (R. 6–9). The petitioner challenges the sufficiency of these counts (Pet. 9–10), contending, in effect, that the statutory language must be employed *in haec verba, i.e.*, that the counts must state that the mail was caused to be delivered "according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed." Patently, the statutory provisions were covered by the language of the indictment that the petitioner knowingly caused the checks "to be delivered by the United States mails" to the named banks. There is a presumption that delivery was to the addressee. *United States* v. *Guest*, 74 F. 2d 730, 731 (C.A. 2). The indictment is a "plain, concise and definite written statement of the essential facts" as to

mailing, within the scope of Rule 7(c), F.R. Crim. P. See *United States* v. *Debrow*, 346 U.S. 374.[2]

2. The petitioner contends that the indictment failed to show that the use of the mails was in execution of the fraud as required by *Parr* v. *United States*, 363 U.S. 370. This argument ignores the fact that the decision in *Parr* was based on the evidence, not on the indictment. Moreover, on its facts, *Parr* involved a "unique" situation in which the mailings of tax notices by the school district were required by law, and the fraud consisted in the taking of tax funds by trustees of the district after the receipt thereof (363 U.S. at 391). Here the indictment specifically alleges that, as a part of the fraudulent scheme, assets of Harold Corporation would be transferred out of the reach of creditors. Nothing in *Parr* suggests that an indictment must negate every possible defense, and there is nothing from the face of the indictment to indicate that such a defense as that in *Parr* is applicable to this particular fraudulent scheme.

3. The petitioner contends with respect to Count 6 that he would not be afforded sufficient remedy with respect to a duplicitous count, which alleged an offense prior to bankruptcy and one concurrent therewith, by an order requiring the government to elect as suggested by the court of appeals (Pet., 2d App. 4). He seeks to treat such an election as "an amendment to the indictment without resubmitting the same

[2] *United States* v. *Hess*, 124 U.S. 483, cited by petitioner (Pet. 9), is inapposite. There the indictment was defective not because of an insufficiency in describing the mailing process but because it was devoid of any explanation of the nature of the fraud.

to the Grand Jury" (Pet. 13). But the petitioner's characterization of the situation is not correct. The indictment remains as found by the grand jury and all that is involved is the trial procedure under which only one of the several charges is tried. See *Salinger* v. *United States*, 272 U.S. 542, 548–549; *Ford* v. *United States*, 273 U.S. 593, 602. As observed by the court of appeals below (Pet., 2d App. 4), the entire count should not be dismissed when a less drastic ruling will suffice without harm to the petitioner. See Rules 2 and 52(a), F.R. Crim. P.; *United States* v. *Charney*, 50 F. Supp. 581, 583 (D. Mass.); *United States* v. *Werner*, 247 Fed. 708, 711 (E.D. Pa.), affirmed *sub nom. Schaefer* v. *United States*, 251 U.S. 466.[1]

4. The petitioner contends, without specifying the language to which he takes exception (Pet. 14–15), that the indictment is not sufficiently plain, concise, and definite. The extent and detail of the indictment arose from the extent and intricacy of the petitioner's fraudulent devices and operations. Moreover, if there were any merit in the petitioner's criticism, his remedy would be by an appropriate, precise motion

[1] The decisions which petitioner cites, *Ex parte Bain*, 121 U.S. 1, 4; *Edgerton* v. *United States*, 143 F. 2d 697, 698 (C.A. 9); and *Carney* v. *United States*, 163 F. 2d 784, 788 (C.A. 9), are not analogous, since they involve amendments to the statement of the charge. The remaining citations by petitioner (*United States* v. *Dembowski*, 252 Fed. 894 (E.D. Mich.); *Creel* v. *United States*, 21 F. 2d 690 (C.A. 8); and *Bratton* v. *United States*, 73 F. 2d 795 (C.A. 10)), to the extent that they are not distinguished by their facts, are contrary to the rationale of this Court's holdings in *Salinger* and *Ford*, *supra*. And see the extensive review of authorities in *United States* v. *Stepp*, 144 F. Supp. 826, 827–829 (D. Colo.).

to strike surplusage. There is no reason for this Court to review the decision of the court below on the particular allegations, a decision which has no general application.[4]

5. As to the conspiracy count the court below held that it did not adequately allege a conspiracy to commit mail fraud, but that it did sufficiently allege conspiracy to commit a bankruptcy offense.[5]

The petitioner contends (Pet. 16) that he cannot know "what is essential to" the conspiracy count as upheld. The transfers of corporate moneys, listed in the count, commenced on September 17, 1957 (R. 16), less than a month and a half before Harold Corporation was alleged to be subject to the filing of a petition in bankruptcy (R. 9). The petitioner accordingly has no problem as to what portion of the count to answer—the whole of it applies to the conspiracy to commit bankruptcy offenses.

CONCLUSION

The judgment below is a correct application of established principles to a limited factual situation.

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[4] The petitioner's citation of *United States* v. *Williams*, 202 F. 2d 572, 574 (C.A. 5), for its criticism of some types of language of an indictment must be read in light of the issues there as to whether the basic element of scienter in a narcotics offense had been charged. See the same case (prior to the cited rehearing) at 202 F. 2d at 713–714.

[5] The defect in the charge with respect to the mail fraud aspect was that in the statement of the intent of the conspiracy the mail fraud was not specifically charged. No such defect exists as to the bankruptcy aspect, for the count charges that petitioner, Strauss, and others conspired "with intent to defeat the bankruptcy laws" (R. 14).

No conflict of decisions is involved. It is respectfully submitted that the petition for a writ of certiorari should be denied.

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APPENDIX A

Statutes and Rules Involved

18 U.S.C. 152:

Whoever knowingly and fraudulently conceals from the receiver, custodian, trustee, marshal, or other officer of the court charged with the control or custody of property, or from creditors in any bankruptcy proceeding, any property belonging to the estate of a bankrupt; or

Whoever knowingly and fraudulently makes a false oath or account in or in relation to any bankruptcy preceeding; or

Whoever knowingly and fraudulently presents under oath any false claim for proof against the estate of a bankrupt, or uses any such claim in any bankruptcy proceeding, personally, or by agent, proxy, or attorney, or as agent, proxy, or attorney; or

Whoever knowingly and fraudulently receives any material amount of property from a bankrupt after the filing of a bankruptcy proceeding, with intent to defeat the bankruptcy law; or

Whoever knowingly and fraudulently gives, offers, receives or attempts to obtain any money or property, remuneration, compensation, reward, advantage, or promise thereof, for acting or forbearing to act in any bankruptcy proceeding; or

Whoever, while an agent or officer of any person or corporation, and in contemplation of a bankruptcy proceeding by or against such person or corporation, or with intent to defeat the bankruptcy law, knowingly and fraudulently transfers or conceals any of the property of such person or corporation; or

Whoever, after the filing of a bankruptcy proceeding or in contemplation thereof, knowingly and fraudulently conceals, destroys, mutilates, falsifies, or makes a false entry in any document affecting or relating to the property or affairs of a bankrupt; or

Whoever, after the filing of a bankruptcy proceeding, knowingly and fraudulently withholds from the receiver, custodian, trustee, marshal, or other officer of the court entitled to its possession, any document affecting or relating to the property or affairs of a bankrupt.

Shall be fined not more than $5,000 or imprisoned not more than five years, or both.

18 U.S.C. 1341:

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Post Office Department, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

Rule 7, F.R. Crim. P.:

* * * * *

(c) *Nature and Contents.*

The indictment or the information shall be a plain, concise and defini[te] written statement of the essential facts const[it]uting the offense charged. It shall be signed by the attorney for the government. It need not contain a formal commencement, a formal conclusion or any other matter not necessary to such statement. Allegations made in one count may be incorporated by reference in another count. It may be alleged in a single count that the means by which the defendant committed the offense are unknown or that he committed it by one or more specified means. * * *

(d) *Surplusage.*

The court on motion of the defendant may strike surplusage from the indictment or information.

* * * * *

Rule 12(b), F.R. Crim. P.:

* * * * *

(2) *Defenses and Objections Which Must Be Raised.* Defenses and objections based on defects in the institution of the prosecution or in the indictment or information other than that it fails to show jurisdiction in the court or to charge an offense may be raised only by motion before trial. The motion shall include all such defenses and objections then available to the defendant. Failure to present any such defense or objection as herein provided constitutes a waiver thereof, but the court for cause shown may grant relief from the waiver. Lack of jurisdiction or the failure of the indictment or information to charge an offense shall be noticed by the court at any time during the pendency of the proceeding.

(3) *Time of Making Motion.* The motion shall be made before the plea is entered, but

the court may permit it to be made within a reasonable time thereafter.

(4) *Hearing on Motion.* A motion before trial raising defenses or objections shall be determined before trial unless the court orders that it be deferred for determination at the trial of the general issue. * * *

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